

**J. ROBERT WOOLEY, COMMISSIONER
OF INSURANCE FOR THE STATE OF
LOUISIANA IN HIS CAPACITY AS
LIQUIDATOR OF AmCARE HEALTH**

**SUIT NUMBER 509,297 SEC. 21
19TH JUDICIAL DISTRICT COURT**

VERSUS

PARISH OF EAST BATON ROUGE

**FOUNDATION HEALTH CORPORATION,
FOUNDATION HEALTH SYSTEMS, INC.,
AND HEALTH NET, INC.**

STATE OF LOUISIANA

**MEMORANDUM IN SUPPORT OF DECLINATORY EXCEPTION OF
LACK OF PERSONAL JURISDICTION AND
PEREMPTORY EXCEPTION OF NO CAUSE OF ACTION**

Defendant, Health Net, Inc. (formerly known as Foundation Health Systems, Inc. and successor to Foundation Health Corporation) ("Health Net"), in support of its Declinatory Exception of Lack of Personal Jurisdiction and Peremptory Exception of No Cause of Action to the Petition to Enforce Guarantee, for Damages and Equitable Relief ("Petition") filed by the plaintiff, J. Robert Wooley, Commissioner of Insurance for The State of Louisiana in His Capacity as Liquidator of Amcare Health, through his duly appointed Receiver, Marlon Harrison ("The Commissioner"), respectfully represents:

I. IMPORTANT FACTUAL BACKGROUND

The Commissioner filed suit against Health Net on June 30, 2003, seeking specific performance of a "Guarantee" that was purportedly executed by or on behalf of Foundation Health Corporation, a predecessor of Health Net, on or about December 9, 1996. The "Guarantee" stated, in part, that "this is to certify that Foundation Health Corporation, the sole shareholder of Foundation Health, a Louisiana Health Plan, Inc. ("FHLHP"), guarantees that it shall provide sufficient capital to FHLHP to ensure that FHLHP maintains the minimum amounts of paid capital and surplus required for an HMO under Louisiana law." (Petition, Ex. A). The "Guarantee" was not executed in connection with any particular contract or obligation of FHLHP, and did not purport to guarantee payment to any creditor of FHLHP. (See Petition, Ex. A).

On or about April 30, 1999, Foundation Health Corporation sold FHLHP to AmCareCo, Inc. ("AmCareCo"). AmCareCo filed a petition with the Commissioner as required by Louisiana law and sought and obtained from the Commissioner, after a review of the acquisition by the Commissioner, approval of the acquisition by AmCareCo of 100% of FHLHP. AmCareCo, as

the sole shareholder of FHLHP, subsequently changed the name for FHLHP to AmCare Health Plans of Louisiana ("AmCare-La").

On or about October 7, 2002, this Court ordered the liquidation of AmCare-La, and appointed the Commissioner as liquidator of AmCare-La. The Commissioner then filed this legal action against Health Net. In his Petition, the Commissioner seeks specific performance of the "Guarantee," the recovery of "an amount sufficient to ensure that AmCare-La meets the minimum amounts of paid capital and surplus required for an HMO under Louisiana law and for all amounts due for the rehabilitation and liquidation of AmCare-La," all amounts allegedly due under the "Guarantee," "all costs associated and resulting from regulatory action, ... and all administrative expenses of the rehabilitation and liquidation of AmCare-La." (Petition, ¶¶ 6, 29-31).

In response, Health Net excepts to the Commissioner's petition on the grounds that this Court lacks personal jurisdiction over the defendant, and that the Commissioner has failed to state a cause of action.

II. REASONS THE EXCEPTIONS SHOULD BE GRANTED

A. This Court Lacks Personal Jurisdiction Over Health Net

Although the Louisiana Long Arm Statute, La. R.S. 13:3201, sets forth several criteria for the exercise of personal jurisdiction, its intent is to extend jurisdiction consistent with that allowed by the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States. *Jasper v. National Medical Enterprises, Inc.*, 94-1120 (La.App. 1 Cir. 6/23/95), 657 So.2d 604. Thus, the only determination necessary is whether jurisdiction over defendant is appropriate under the provisions of the due process clause.

A constitutionally valid exercise of personal jurisdiction requires 1) that the defendant have some minimum contacts with the forum state resulting from affirmative or purposeful conduct of the defendant, and 2) that it is not unfair or unreasonable to require the defendant to defend the suit in the forum state. *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359 (5th Cir. 1990); *Growden v. Ed Bowlin and Associates, Inc.*, 733 F.2d 1149 (5th Cir. 1984). Each of these requirements must be satisfied; a finding of fairness cannot compensate for the lack of minimum contacts with the forum. *Growden, supra*; *Burk v. Gibbans*, 93-0855 (1st App. 4th Cir. 6/15/93), 620 So.2d 478.

In this case, this Court lacks jurisdiction over Health Net because, as discussed below, neither requirement is satisfied.

1. The mere fact that the "Guarantee" was eventually delivered to the Commissioner does not give this Court personal jurisdiction over Health Net

The Commissioner seeks to enforce the "Guarantee." But the "Guarantee" was not signed in Louisiana for the benefit of any Louisiana creditor. Rather, an officer of Health Net's predecessor, Foundation Health Corp., simply executed the "Guarantee" to FHLHP. Eight months later a copy of the "Guarantee" was mailed to the Commissioner. (See Petition, Ex. B). This mailing of the "Guarantee" to the Commissioner is simply too attenuated to be considered purposeful contact with Louisiana that establishes personal jurisdiction over Health Net.

In *Ingram Contractors, Inc. v. Rowley*, 360 So.2d 593 (La.App. 4 Cir. 1978), writ denied, 363 So.2d 72 (La. 1978), the Court held that it did not have personal jurisdiction over a non-resident on a promissory note in which the non-resident made himself personally liable for the corporate debt of a defunct Louisiana Corporation. The Court recognized that the cause of action involved a non-resident's execution of a promissory note purporting to make him liable for an already incurred debt of a third party. Because the promisor was a non-resident when he executed the note, and the signing of the note occurred in Mississippi, the Court held that his signing of the note did not have a sufficient relationship with Louisiana for a Louisiana Court to exercise personal jurisdiction. *Id.* at 594-595. In reaching this conclusion, the Court recognized that a state arguably has jurisdiction over the non-resident maker of a note when the note specifies performance in that state. However, because the note did not specify a place for a payment, the Court stated that demand for payment had to be made in the place of business or residence of the maker. *Id.* at 594, n.1. See also La. Rev. Stat. Ann. §10:3-111.

The same reasoning is applicable here. Foundation Health Corp. was not a Louisiana corporation, and, therefore, was a non-resident at the time the "Guarantee" was executed. Therefore, like the promissory note in *Ingram Contractors*, the signing of the "Guarantee" in this case simply does not bear a sufficient relationship with Louisiana for this Court to exercise personal jurisdiction over Health Net. This is especially true considering that the "Guarantee" does not specify a place for performance, which means that Foundation Health Corp.'s place of business, California, is the proper state in which the demand for payment should be made. Consequently, this Court lacks personal jurisdiction over the defendant.

2. *Health Net's ownership of stock in AmCareCo does not give this Court personal jurisdiction over Health Net*

The Commissioner alleges that at the time of the execution of the "Guarantee," Health Net's predecessor, Foundation Health Corp., was the parent company of FHLHP (Petition, Ex. A). This alleged business relationship does not give the Court personal jurisdiction over Health Net.

A non-resident's mere ownership interest in a Louisiana corporation is simply not the type of purposeful contact with a state that establishes personal jurisdiction. Otherwise, any individual who invests in the stock market could potentially be subject to personal jurisdiction in all fifty states, regardless of whether that person has ever traveled outside of his home state. It would be unfair and unreasonable to expect such a person to defend lawsuits across the country.

Health Net is that non-resident shareholder in this case. Specifically, Health Net, which is a holding company that does not itself do business in Louisiana, owned a subsidiary that does business in Louisiana. That relationship does not in and of itself subject that parent company to personal jurisdiction in Louisiana, and to conclude otherwise would ignore the corporate identities and separateness of companies. Therefore, this Court lacks personal jurisdiction.

B. *The Petition Fails to State a Cause of Action Against Health Net*

An exception of no cause of action tests whether the law extends a remedy to anyone under the factual allegations of the petition. *Capital City Towing & Recovery, Inc. v. City of Baton Rouge*, 97-0098 (La. App. 1 Cir. 2/20/98), 709 So. 2d 248, *reh'g denied*, March 24, 1998. While a court must accept the allegations in a petition as true, a court must also sustain an exception when the law does not provide a remedy for the facts alleged. *Williams v. Orleans Parish School Board*, 611 So. 2d 718 (La. App. 4th Cir 1992). As explained below, in this case, the law does not provide the Commissioner a remedy for the facts alleged in the Petition.

1. *There is no cause of action for specific performance for the payment of money*

The Commissioner seeks "specific performance of the Guarantee executed by Foundation Health Corporation on December 9, 1996." (Petition ¶ 31). The Commissioner, however, does not have a cause of action for specific performance in this case.

Louisiana Courts have long held that specific performance is not an available remedy for the obligation to pay money. *McGaw v. O'Berine*, 52 So.775, 777 (La. 1910). Rather, when a party seeks the payment of money, "the case resolves itself into one for damages for breach of

contract." *Id.* Similarly, in *Kenner v. Slidell Savings & Homestead Assn.*, 128 So. 475, 476 (La. 1930), the Court held that the plaintiff had no cause of action for specific performance of an alleged agreement in which the defendant was to loan the plaintiff money on credit. In so holding, the Court stated that "the violation of an agreement to pay or lend a certain sum of money does not give a right of action for specific performance." *Id.*

This jurisprudence establishes that the Commissioner's petition does not state a cause of action for specific performance. The Commissioner seeks to have Health Net pay some amount of money that is allegedly due under the "Guarantee." But, as established long ago by *McGaw* and *Kenner*, the agreement to pay or lend a certain sum of money does not give a party a cause of action for specific performance. Therefore, the Commissioner's petition fails to state a cause of action against Health Net.

2. *The "guarantee" is not a suretyship under Louisiana law, and, therefore, the Commissioner does not have a cause of action to enforce the "guarantee"*

Under Louisiana law, a "guaranty" is the same as a suretyship and is considered an accessory contract whereby an obligor binds himself to a creditor to fulfill the obligation of another in the event the latter fails to do so. La. Civil Code Art. 3035; *Carney v. Boles*, 643 So.2d 339 (La.App. 2 Cir. 1994). In this case, as the Court will observe from the petition and exhibits submitted by plaintiffs, there is simply no agreement by Foundation Health Corporation to bind itself to the Commissioner or any other creditor of FHLHP.

If the Commissioner as liquidator is bringing this action as a creditor of FHLHP, there is simply no cause of action that allows him to do so and the claim must be dismissed.

3. *There is no cause of action against a non-shareholder under a "Parental Guarantee"*

As the Court can see from a review of the exhibits attached to and made a part of the plaintiffs' petition, the "Guarantee" addresses only the provision of "capital" to a subsidiary corporation by Foundation Health Corporation, "the sole shareholder of Foundation Health Plan, Inc." - i.e. the parent corporation of FHLHP. Thus, by its terms, the "Guarantee," whatever its ultimate effect may have been, does not provide any possibility of recovery against Foundation Health Corporation if it is no longer the parent company.

The Court will note that the Commissioner agrees with this proposition. Exhibit B to the petition is the response of Foundation Health Systems, Inc. to certain requests by the

Commissioner. In paragraph 8, the request of the Commissioner is described to be a request for a "parental guarantee" in which the parent would guarantee that "Foundation Health will meet the statutory net worth requirement as long as Foundation Health is a subsidiary...." The "Guarantee" sued upon herein is the "Guarantee" submitted in response to the Commissioner's request.

As the Commissioner has alleged in his petition, in April 1999 the Commissioner approved the acquisition of FHLHP by AmCareCo from Foundation Heath Corporation. (Petition)

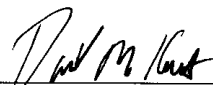
As a result of that transaction, Foundation Health Corporation was no longer a shareholder, and, therefore, no longer the parent, of FHLHP. There was clearly no longer any obligation on the part of Foundation Health Corporation to contribute "capital" to a corporation in which it had no ownership interest.¹ The Commissioner approved the transaction and this Court can only conclude that there can be no cause of action to recover anything from Foundation Health Corporation under the "Guarantee" executed years prior when Foundation Health Corporation was the sole shareholder, and, thus, the parent of FHLHP.

The pleadings and exhibits thereto clearly establish that the Commissioner has no cause of action for recovery of anything from Foundation Health Corporation.

III. CONCLUSION

For the foregoing reasons, this Court lacks personal jurisdiction over Health Net, and the Petition fails to state a cause of action against Health Net. Therefore, this Court should maintain Health Net's declinatory exception of lack of personal jurisdiction and peremptory exception of no cause of action and dismiss the claims against Health Net.

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¹ In fact, even if Foundation Health Corporation had maintained an ownership interest in FHLHP, Foundation Health Corporation, as a party owning less than 100% of the stock of FHLHP, could not have contributed any additional capital to FHLHP.

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Please serve:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on all counsel of record by
First Class Mail, properly addressed and posted, on the 12 day of October, 2003.



